In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-547

CHENG, PUN HOI, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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1. Petitioner was born in Foochow, on the mainland of China, on December 12, 1934. He subsequently migrated to Hong Kong in 1961 and illegally entered this country on or about August 28, 1970 (R. 24).[1]

Thereafter, petitioner was served with an Order to Show Cause, charging that he was deportable since

[1] "R." designates references to the certified administrative record filed with the court of appeals.

he had entered the country without inspection (R. 24). Following a deportation hearing on May 19, 1972, at which petitioner conceded that the factual allegations in the Order to Show Cause were true, he was ordered deported (R. 23). Upon the advice of his counsel, petitioner declined to designate a place of deportation; the immigration judge therefore ordered him deported to the Republic of China on Formosa or, alternatively, to Hong Kong (R. 23).[2] Petitioner was granted the privilege of voluntary departure, but he did not depart within the period authorized.[3]

On September 25, 1972, pursuant to the United Nations Protocol Relating to the Status of Refugees, petitioner filed an application for political asylum in the United States, claiming that he was a political refugee from mainland China. He alleged that he had fled mainland China because of the Communist control of that country (R. 22). This application was denied on November 21, 1973 (R. 20).[4]

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[2] The Republic of China on Formosa subsequently refused to accept petitioner.

[3] An alien who has been deported must receive special authorization from the Attorney General before he may reenter this country. 8 U.S.C. 1182(a)(17). If a deportable alien departs voluntarily, however, he is not subject to this particular statutory requirement.

[4] Petitioner subsequently participated in litigation seeking to enjoin the deportation of a group of more than 100 aliens, on the ground that the denial of asylum was arbitrary, capricious and illegal (R. 11-12). The district court denied relief, holding that each of the aliens was, by his own admis-

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On December 11, 1974, petitioner moved to reopen the 1972 deportation proceeding to correct the deportation order to reflect the fact that petitioner is a citizen of the Peoples Republic of China and that he should have been ordered deported to that country rather than to the Republic of China at Taiwan. The immigration judge denied the motion with an opinion (R. 10-14). Finding itself in agreement with the decision of the immigration judge, the Board of Immigration Appeals dismissed petitioner's appeal (Pet. App. 7a-10a). In a *per curiam* opinion dated August 18, 1975, the court of appeals denied the petition for review (Pet. App. 1a-6a).

2. Petitioner argues that he is a citizen of the Peoples Republic of China, rather than of Taiwan, and that the immigration judge therefore erred in not ordering his deportation to mainland China pursuant to the provisions of 8 U.S.C. 1253(a). Petitioner so argues in order to make himself eligible, as a citizen of the Peoples Republic of China, to apply for political asylum in this country under 8 U.S.C. 1253(h) (Pet. 6).[5]

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sion, illegally in the United States and therefore was not entitled to the benefits of the Protocol. See *Kan Kam Lin, et al.* v. *Rinaldi*, 361 F. Supp. 177 (D. N.J.), affirmed, 493 F.2d 1229 (C.A. 3), certiorari denied, 419 U.S. 874. See also Pet. App. 4a, n. 5.

[5] Section 1253(h) provides:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political

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a. Under 8 U.S.C. 1253(a) there is a three-step procedure to determine the place of deportation. The first step is deportation to the country designated by the alien; here, as we have noted, petitioner refused to designate such a country. The second step, which is reached when the alien refuses to designate a country or the designated country refuses to accept him, provides that the alien may be deported to "any country of which such alien is a subject national, or citizen if such country is willing to accept him into its territory." If the country of nationality is unwilling to accept the alien, then the third step is reached and the Attorney General has discretion to select a country from a series of alternatives, which include, *inter alia*, deportation to "the country from which [the] alien last entered the United States." 8 U.S.C. 1253(a)(1). See Gordon and Rosenfield, *Immigration Law and Procedure*, Section 5.17c (1975).

b. As petitioner acknowledges, at the time of his deportation hearing it was established that a Chinese alien, born on mainland China, was considered a citizen of the Republic of China on Formosa for the purposes of deportation proceedings. See, *e.g.*, *Ng Kam Fook* v. *Esperdy*, 320 F.2d 86 (C.A. 2), certiorari denied, 375 U.S. 955; *Lee Wei Fang* v. *Kennedy*, 317 F.2d 180 (C.A. D.C.). Petitioner contends, however, that since his deportation the Department of State has changed its position with respect to the

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opinion and for such period of time as he deems to be necessary for such reason.

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Peoples Republic of China, that it now regards aliens from mainland China as citizens of that country and that, accordingly, the Peoples Republic of China should now be designated as petitioner's country of deportation.

The characterization in internal State Department memoranda of persons born on the mainland of China as citizens of the Peoples Republic of China does not alter the propriety of the deportation order in this case. As the court below agreed, there is no appropriate government with which the United States has diplomatic relations for purposes of Section 1253 (a). (Pet. App. 5a). The word "country" as used in the second step of 8 U.S.C. 1253(a) means a recognized political entity, not merely a geographical location. As the court of appeals stated in *Ng Kam Fook* v. *Esperdy*, *supra*, 320 F.2d at 88:

> In connection with naturalization and citizenship the dominant consideration is not geographical and in such case it is not unreasonable to construe the word "country" as meaning a foreign state with the rights and responsibilities under international law of a member of the family of nations. This apparently is what the court had in mind when Judge Hand said in the Man case in referring to deportation of a Chinese alien to the mainland under the third priority. "We assume that he cannot be regarded as a 'subject national, or citizen' of the Communist Government, because we do not recognize that as more than a *de facto* govern-

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ment." [Citing *United States ex rel. Tom Man* v. *Murff*, 264 F.2d 926, 928 (C.A. 2).]

Thus, even if petitioner were regarded as a citizen of the Peoples Republic of China, there is no appropriate avenue to direct a request for admission of an alien to that country pursuant to Section 1253 (a). See also *Lee Wei Fang* v. *Kennedy*, *supra*, 317 F.2d at 184.

Since the United States recognizes and maintains diplomatic relations only with the Republic of China at Formosa, petitioner's deportation order to that country was proper. However, since the Republic of China at Formosa indicated that it would not accept petitioner as a deportee, deportation to Hong Kong, the location of petitioner's residence prior to his illegal entry into this country, was a permissible option within the discretion of the Attorney General under the third step of the Act.

c. Assuming, *arguendo*, that the Peoples Republic of China is regarded as a "country" under the second priority of the statute, petitioner has failed to present any evidence that he is a subject national of that government. Indeed, the evidence indicates that the contrary is true. Petitioner was born on the mainland of China in 1934, at a time when that country was controlled by the Nationalist government. The record demonstrates that petitioner fled mainland China "because of the Communist control of that country" (R. 22). He thereafter resided in Hong Kong for a period of approximately nine years. Following his illegal entry into the United States and

subsequent deportation proceeding, petitioner requested political asylum from the "Communist dominated" regime on the mainland. (R. 21, 22). It is apparent from the record that petitioner's allegiance is not to the present government on the mainland. Since the term "national" as used in the Immigration and Naturalization Act (8 U.S.C. 1101(a)(21)) is defined as a person owing permanent allegiance to a state (see *Delany* v. *Moraitis*, 136 F.2d 129, 130 (C.A. 4)), in these circumstances petitioner's allegiance must remain with the Nationalist government now on Formosa. See *Lee Wei Fang* v. *Kennedy*, *supra*, 317 F.2d at 185-186.

Finally, it is also clear that in no circumstances would petitioner actually wish to be deported to the Peoples Republic of China and that he would immediately seek political asylum in this country if he were ordered deported there. In assessing petitioner's claim that his place of deportation must be changed to the Peoples Republic of China, the immigration judge aptly observed (R. 12, 13):

> We must therefore ask ourselves why this strange, belated behavior. In my estimation it is meant solely to confound, confuse and delay the government in its efforts to deport all of these respondents.
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> I will not permit such a futile operation. Counsel is not seeking true justice but only a delay of the ultimate inevitable result, their deportation to Hong Kong.

In these circumstances, the immigration judge properly denied petitioner's motion to reopen since it was not made in good faith but solely for the purposes of delay and as a means to obtain political asylum in the United States. See, *e.g.*, *Ngai Chi Lam* v. *Esperdy*, 411 F.2d 310 (C.A. 2); *Lee Wei Fang* v. *Kennedy*, *supra*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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